

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

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Certiorari to Greenville County

Honorable John C. Hayes, Circuit Court Judge

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VICTOR NOE ORTIZ-DELVALLE,

RECEIVED  
APR 11 2017  
S.C. SUPREME COURT  
PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002414

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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**ISSUE PRESENTED**

Whether plea counsel was ineffective in giving petitioner incorrect sentencing advice?

## STATEMENT

On February 2, 2015, petitioner appeared before the Honorable D. Garrion Hill and pled guilty to first-degree criminal sexual conduct with a minor. He was sentenced to life imprisonment. Larry H. Cooke, Esq. and John K. Erwin, Jr., Esq. represented petitioner. Christine K. Sustakovitch, Esq. was the assistant solicitor (App. p. 1 -p. 28).

Petitioner filed an application for post-conviction relief on July 30, 2015. (App. p. 29-p. 35). Respondent filed a return dated January 29, 2016. (App. p. 36- p. 39). An evidentiary hearing was held on October 25, 2016, before the Honorable John C. Hayes, III. Petitioner was present and was represented by Brian P. Johnson, Esq. Respondent was represented by Patrick L. Schmeckpeper, Assistant Attorney General. Petitioner and both plea counsels testified at the hearing. (App. p. 40- p. 70). On October 31, 2016, Judge Hayes issued an order denying and dismissing the application for post-conviction relief. (App. p. 71- p. 76).

This petition follows.

## ARGUMENT

Plea counsel was ineffective in giving petitioner incorrect sentencing advice to plead guilty.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S. Ct. 2052 (1984); Stalk v. State, 383 S.C. 559, 681 S.E. 2d 592 (2009). With respect to a guilty plea the second prong above looks at whether defense counsel's deficient performance affected the outcome of the plea process. Stalk v. State, *supra*. This means that there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty but would have insisted on going to trial. In Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366 (1985). This usually involves counsel's giving of incorrect sentencing advice or legal advice about the charges against his client. Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989); Ray v. State, 303 S.C. 374, 401 S.E.2d 151 (1991); Pelzer v. State, 381 S.C. 217, 672 S.E. 2d 790 (Ct. App. 2009); Morris v. State, 371 S. C. 278, 639 S.E. 2d 53 (2006).

Besides attacking a guilty plea based on ineffective assistance of counsel, a defendant may challenge the guilty plea on other constitutional grounds. The United States Supreme Court explained in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969) that "a plea of guilty is more than admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." 395 U.S. at 242-243, 89 S. Ct. at 1712. As the Court in Boykin held, due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege

against compulsory self-incrimination, the right to trial by a jury, and the right to confront one's accusers. A valid waiver of these rights cannot be presumed from a silent record. 395 U.S. at 243, 89 S. Ct. at 1712. In State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975), the court held that the "essence" of Boykin was to make the requirements of Rule 11 of the Federal Rules of Criminal Procedure applicable to the States. In State v. Patterson, 278 S.C. 319, 295 S.E. 2d 264 (1982), the court held that for there to be a valid waiver under the due process clause of the three constitutional rights listed in Boykin, the record must clearly establish it.

In this case petitioner testified at the evidentiary hearing that his attorney kept telling him that he should plea guilty because if he went to trial he would get life. That is why he pled guilty. (App. p. 45, lines 5-12) He said he would not have pled guilty if he was told he was pleading to a life sentence. He thought he was going to get 25 years. Larry Cooke told him this. He kept telling him if he went to trial, he would get life. (App. p. 49, line 20- p. 50, line 10) Petitioner reiterated this on cross-examination. (App. p. 53, lines 12-15).

As discussed above, giving incorrect sentencing advice constitutes ineffective assistance of counsel.

CONCLUSION

Petitioner's guilty plea should be vacated.

*Robert M. Pachak*

Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of April, 2017.

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PETITION TO BE RELIEVED AS COUNSEL

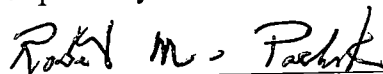
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Counsel for Victor Noe Ortiz-Delvalle states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge John C. Hayes, which was held on October 25, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Victor Noe Ortiz-Delvalle.

Respectfully Submitted,



Robert M. Pachak


Appellate Defender

ATTORNEY FOR PETITIONER

This 11th day of April, 2017.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
Robert M. Pachak  
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South Carolina Commission on Indigent  
Defense  
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ATTORNEY FOR PETITIONER

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Jessica Kinard, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Victor Noe Ortiz-Delvalle, #362880, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 11th day of April, 2017.

Robert M. Pachak  
Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 11th day of April, 2017.

Marisa Hernandez (L.S)  
Notary Public for South Carolina  
My Commission Expires: July 3, 2023